

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLDEN JERMAINE MEDLEY,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 272069

Wayne Circuit Court

LC No. 06-002997-01

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 23 to 60 months for the felon in possession and CCW convictions and a consecutive two-year term for the felony-firearm conviction. We affirm. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

On the night of January 26, 2006, Officers Bridges and Johnson spotted defendant walking down the middle of Van Buren Street. A Detroit ordinance prohibits walking in the street where sidewalks exist. As the police car pulled closer, defendant began to run. Officer Johnson chased defendant through several alleys and between several houses. Before Officer Johnson apprehended defendant, defendant pulled a nickel-plated handgun from the inside pocket of his jacket, and he threw it to the ground in a field behind a house. Officer Johnson returned to the field and recovered the handgun. Nyra Turner, an investigator for the Detroit police for 13 years, received the handgun. At trial, Turner did not have the gun, and she testified that she could not get it on such short notice. She had filled out the paperwork for test firing and fingerprinting. However, the gun was not transferred to the gun lab, and the property officer was on leave. Also, a videotape that was functioning in the patrol car was not placed into evidence.

II. EFFECTIVE ASSISTANCE OF COUNSEL

First, defendant argues that he was denied the effective assistance of counsel by his attorney's failure to request an adverse inference instruction. US Const, Am VI; Const 1963, art 1, § 20. We disagree.

A. Standard of Review

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlance*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant failed to file a motion for a new trial for an evidentiary hearing. Therefore, our review is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

B. Analysis

An adverse inference instruction would have related to the prosecution's failure to supply the firearm, the results of any fingerprint tests on the gun, and the court-ordered videotape from the patrol car. Such instruction would have allowed the jury to infer that this evidence would have been unfavorable to the prosecution. See CJI 2d 5.12; *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). While the prosecution's explanations of nonproduction of the evidence left much to be desired, they showed nonculpable conduct by police department employees and not bad faith. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Further, defendant has not shown that counsel's performance was defective and prejudicial under the standards in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999), and *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998).

III. ADMISSIBILITY OF WITNESS TESTIMONY

Next, defendant claims that the trial court erred reversibly in allowing Investigator Nyra Turner to testify that most guns do not yield useful fingerprints and to suggest possible reasons for her opinion testimony. Again, we disagree.

A. Standard of Review

This Court reviews a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). A trial court's decision to admit evidence that involves a preliminary question of law is reviewed de novo. *Id.*

B. Analysis

Officer Turner was not qualified as an expert under MRE 702. However, her testimony was proper as lay opinion testimony under MRE 701. *People v Oliver*, 170 Mich App 38, 50; 426 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989). In *People v Grisham*, 125 Mich App 280, 286; 335 NW2d 680 (1983), this Court, interpreting MRE 701, stated that “any witness is qualified to testify as to his or her physical observations and opinions formed as a

result of these observations.” The testimony in question was clearly of this type and not objectionable.

IV. DOUBLE JEOPARDY

Finally, we reject defendant’s claim that his convictions for felony-firearm and felon in possession stemming from the same conduct violate the double jeopardy clause. US Const, Am V; Const 1963, art 1, § 15.

A. Standard of Review

A double jeopardy challenge is a question of constitutional law that this Court reviews de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

B. Analysis

A similar claim was made and rejected in *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), and does not merit reversal of defendant’s convictions.

Additionally, in his Standard 4 brief, defendant makes further double-jeopardy arguments that appear not to recognize that the lower court amended its order to specifically provide that the predicate felony for felony-firearm was felon in possession and not CCW. Alternatively, defendant claims that one may never be convicted of both felony-firearm and CCW for possessing the same gun. However, this claim was rejected in *People v Dillard*, 246 Mich App 163, 171 n 5; 631 NW2d 755 (2001), and therefore also does not merit reversal of defendant’s convictions.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher